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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

TOTAL CONDO CONCEPTS, INC. and STEWART TITLE GUARANTY COMPANY,

Petitioners,

v.

COUNTY OF SAN DIEGO and MICHAEL SGOBBA, AS MARSHAL OF THE COUNTY OF SAN DIEGO,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a statutory scheme deny due process when it effectively immunizes the state from civil liability for selling private property at an execution sale without reasonable notice having been given and without providing an adequate post-sale remedy?

LIST OF PARTIES, INCLUDING RELATED CORPORATIONS

In the Court of Appeal for the State of California, Fourth Appellate District, Division One, TOTAL CONDO CONCEPTS, INC., a California corporation, and STEWART TITLE GUARANTY COMPANY, a Texas corporation, were Appellants. THE COUNTY OF SAN DIEGO and MICHAEL SGOBBA, AS MARSHAL OF THE COUNTY OF SAN DIEGO, were Respondents.

STEWART TITLE GUARANTY COMPANY is a wholly owned subsidiary of Stewart Information Services Corporation. STEWART TITLE GUARANTY COMPANY has two subsidiaries which are not wholly owned – Stewart West Coast Title Company and Stewart Title of Central New Jersey, Inc. Appellants have no other parent companies or subsidiaries which are not wholly owned.

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OPINIONS BELOW

The opinion of the Court of Appeal for the State of California, Fourth Appellate District, Division One,[1] was filed on July 19, 1990. It was ordered not to be published in the official reports. It is reprinted in the appendix hereto, beginning at page App. 19.

Petitioners requested review by the California Supreme Court. The California Supreme Court's October 11, 1990 unpublished order denying review is reprinted in the appendix hereto at page App. 51.

JURISDICTION

In their original and amended complaints, filed in the Superior Court of the State of California for the County of San Diego, Petitioners alleged that Respondents deprived Petitioners of their property without due process in violation of the Constitution of the United States. The Superior Court ultimately sustained demurrers without leave to amend as to all claims asserted against Respondents. Petitioners appealed from the subsequent judgment entered in favor of Respondents.

Petitioners asserted due process claims under the United States Constitution in the Court of Appeal and in the California Supreme Court. The Court of Appeal upheld the validity of the statutes in question and the

[1] The Court of Appeal for the State of California, Fourth Appellate District, Division One, is referred to hereafter as the Court of Appeal.

conduct of Respondents pursuant to those statutes in its opinion filed July 19, 1990. The California Supreme Court denied review on October 11, 1990.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. section 1257(a).

STATUTES INVOLVED

This Petition is based on the due process clause of section one of the 14th Amendment to the United States Constitution which provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The transaction underlying this Petition involves provisions of California's Enforcement of Judgments Law[2] and Bond and Undertaking Law.[3] The principal statutes involved are set forth in the appendix hereto, beginning at page App. 1.[4]

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[2] Cal. Code Civ. Proc. §§ 680.010 to 724.260.

[3] Cal. Code Civ. Proc. §§ 995.010 to 996.560.

[4] All statutes referred to herein and set forth in the appendix are from the California Code of Civil Procedure as it read in 1984 when the transaction underlying Petitioners' complaint occurred. No subsequent amendments are relevant to the Court of Appeal's opinion or the sale of Petitioners' property.

STATEMENT OF THE CASE

Petitioner TOTAL CONDO CONCEPTS, INC.[5] owned a 26-unit condominium complex located in San Diego, California. Petitioner STEWART TITLE GUARANTY COMPANY[6] insured TOTAL CONDO's title to the property.[7]

This Petition is filed because Respondents held an execution sale at which TOTAL CONDO's real property, worth over $5,000,000, was sold for only $210,000. The sale occurred without proper notice having been given, and thus before Petitioners had an opportunity to exercise certain rights to prevent the sale.

The property was subject to an execution lien in favor of a judgment creditor of a prior owner. In 1983 and 1984, the creditor pursued efforts to have the property sold to satisfy the judgment. In order to stop the sale, on May 24, 1984, in accord with the Enforcement of Judgments Law, STEWART filed a third-party claim[8] on behalf of TOTAL CONDO in the office of MICHAEL SGOBBA as MARSHAL OF THE COUNTY OF SAN DIEGO.[9] The third-party claim asserted ownership and a right to possession superior to the judgment creditor's lien.[10]

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[5] Hereafter referred to as "TOTAL CONDO."

[6] Hereafter referred to as "STEWART."

[7] As TOTAL CONDO's title insurer, STEWART asserts a right of subrogation to TOTAL CONDO's claim.

[8] Cal. Code Civ. Proc. § 720.110(a), App. 2.

[9] Respondents and their agents are collectively referred to hereafter as "MARSHAL."

[10] Cal. Code Civ. Proc. § 720.110(a), App. 2.

Under the Enforcement of Judgments Law, once a third-party claim is filed, the MARSHAL cannot sell the property[11] unless the creditor takes appropriate steps in accord with the governing statutes.[12] If a creditor takes such steps to move the sale forward, the statutes provide a variety of methods for a third-party claimant to respond and prevent an execution sale.[13]

On May 29, 1984, the judgment creditor presented a bond to the MARSHAL[14] in the amount of only $7,500 in an effort to cause the sale to proceed. No affidavit of service was given and filed with the bond as required by law,[15] and thus it was patently obvious that the bond had not been served on Petitioners as the statutes require.[16] Nonetheless, the MARSHAL improperly conducted the execution sale only 23 minutes after the bond was filed and approximately 3½ hours before the bond was served on Petitioners. Of course, by the time Petitioners were finally served with the bond it was too late for them to respond and prevent the sale.

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[11] Cal. Code Civ. Proc. § 720.150(a)(1), App. 7.

[12] Cal. Code Civ. Proc. § 720.160(a)(1), App. 8.

[13] See, e.g., Cal. Code Civ. Proc. §§ 720.160(a)(1), 720.610-720.630, 995.910-995.930, App. 8, App. 10 - App. 12, App. 16 - App. 18.

[14] Cal. Code Civ. Proc. § 720.160, App. 8.

[15] Cal. Code Civ. Proc. §§ 995.020, 995.370, App. 14 - App. 15.

[16] *Id.*

Under the Enforcement of Judgments Law, the execution sale was final and could not be set aside.[17] Thus, the execution sale resulted in TOTAL CONDO irrevocably losing its property.

Petitioners filed suit asserting several causes of action against the MARSHAL including denial of Petitioners' right to due process under the Constitution of the United States. The Superior Court for the State of California, County of San Diego, ultimately sustained the MARSHAL's demurrers to all of Petitioners' claims against the MARSHAL, including the due process claim, without leave to amend. The Court of Appeal affirmed the subsequent judgment entered in favor of the MARSHAL, with the Honorable Justice Howard B. Wiener dissenting. The California Supreme Court denied Petitioners' request for a hearing, with the Honorable Justice Stanley Mosk of the opinion that review should be granted.

As a consequence of the Court of Appeal's interpretation and application of the statutes involved, Petitioners have suffered a final deprivation of their property without prior notice and an opportunity to respond, yet are left with no post-deprivation remedy against the responsible government agents. That is, Petitioners have been deprived of their property without due process of law.

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[17] Cal. Code Civ. Proc. § 701.680(a), App. 1.

REASONS FOR GRANTING THE PETITION

A. Petitioners Have Been Deprived of Property Without Due Process Because The Marshal Sold Their Property at an Execution Sale Without Reasonable Notice and an Opportunity for Them to Respond Before the Sale, and They Have No Post-Sale Remedy Against the State.

1. What Process Is Due?

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) set forth the fundamental due process principles of notice and an opportunity to respond before deprivation:

a. "The fundamental requisite of due process of law is the opportunity to be heard."[18]

b. "The right to be heard has little reality or worth unless one is informed that the matter is pending and can chose for himself whether to appear or default, acquiesce or contest."[19]

c. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[20]

d. "The notice must be of such nature as reasonably to convey the required information . . . and it

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[18] *Mullane*, 339 U.S. 306, 314, quoting from *Grannis v. Ordean*, 234 U.S. 385 (1914).

[19] *Mullane*, 339 U.S. 306, 314.

[20] *Id.*

must afford a reasonable time for those interested to make their appearance . . . . "[21]

e. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[22]

2. The Enforcement of Judgments Law Provisions at Issue.

Under California's Enforcement of Judgments Law, one claiming a superior ownership interest or right to possess property subject to an execution lien may file a third-party claim.[23] The third-party claim must contain the name of the third-party claimant and an address where service may be made on the claimant.[24] The marshal must serve the third-party claim on the creditor.[25] Thus, from the moment the creditor learns of the third-party claim, it also knows where to serve the third-party claimant.

When a third-party claim is filed, the marshal may not sell the property unless the creditor takes certain steps in accord with the statutes.[26] If the creditor desires

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[21] *Id.*

[22] *Id.* at 315.

[23] Cal. Code Civ. Proc. § 720.110(a), App. 2.

[24] Cal. Code Civ. Proc. § 720.130(a)(1), App. 4.

[25] Cal. Code Civ. Proc. § 720.140(a), App. 5.

[26] Cal. Code Civ. Proc. § 720.150(a)(1), App. 7.

to have the marshal conduct an execution sale after a third-party claim is filed, the creditor may file a bond for the benefit of the third-party claimant.[27] Such a bond must be served on the third-party claimant and be accompanied by an affidavit of service when it is filed.[28]

If a creditor serves and files a bond in an effort to have the property sold, this does not assure a sale. Rather, the third-party claimant may take one or more responsive actions in order to protect its interests and prevent an execution sale. The third-party claimant may either object to the sufficiency of the creditor's bond and have his objections heard or file a counter bond which releases the property from levy.[29]

Once an execution sale occurs, it is final and cannot be set aside.[30] Therefore, the California legislature recognized that it is impractical to assert third-party rights after an execution sale.[31] Accordingly, the Enforcement of Judgments Law was intended to protect the interests of third-party claimants and resolve competing claims to property before the property can be sold.[32]

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[27] Cal. Code Civ. Proc. § 720.160(a)(1), App. 8.

[28] Cal. Code Civ. Proc. §§ 995.020, 995.370, App. 14 – App. 15.

[29] Cal. Code Civ. Proc. §§ 720.160(a)(1), 720.610 – 720.630, 995.910 – 995.930, App. 8 – App. 9, App. 10 – App. 12, App. 16 – App. 18.

[30] Cal. Code Civ. Proc. § 701.680(a), App. 1.

[31] 16 Cal. Law Rev. Comm. Rep. 1144 (1982).

[32] *Id.*

3. The Court of Appeal's Interpretation and Application of the Enforcement of Judgments Law Has Denied Petitioners Due Process.

The Court of Appeal has interpreted the Enforcement of Judgments Law to sanction the sale which caused Petitioners to lose their property interests even though Petitioners were never notified of the judgment creditor's bond until after the sale when it was too late for them to exercise their rights to object to the sufficiency of the bond or file a counter bond to stop the sale. Despite this determination that the statutes authorized the MARSHAL to conduct an execution sale which resulted in a final deprivation of TOTAL CONDO's ownership interest in the property in the absence of notice that the creditor had filed the bond which caused the sale to go forward, the Court of Appeal rejected Petitioners' due process claim.

The Honorable Justice Howard B. Wiener dissented from the Court of Appeal's majority. As Justice Wiener correctly noted: "If the proof of service does not accompany the bond delivered to the Marshal, the third party claimant has no assurance that he will receive notice of the undertaking with its concomitant right to object and be heard on the sufficiency of that bond."[33] Concerning Petitioners' right to file a bond in response to the creditor's bond and thereby prevent the sale, Justice Wiener noted that "the majority fails to explain how [Petitioners] could have accomplished either of the foregoing in the 23 minutes that ensued after the bond was posted where they had no knowledge of the posting until

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[33] Court of Appeal opinion, Justice Wiener dissent, App. 48.

approximately two hours [sic] after the sale was conducted."[34] Directly addressing the due process issue, Justice Wiener stated:

> If . . . the majority has properly construed the various statutory provisions, then I must conclude [Petitioners] are correct in contending they have been denied due process of law. While I agree with the majority that the "statutory scheme provides a third party claimant with a means to delay an execution sale pending hearing on the validity of the third party claim and the sufficiency of the creditor's undertaking" . . . I am unable to understand how the majority expects those means to be effectively utilized within a 23-minute time span where the affected parties were uninformed. If a statutory scheme requires prescience to be effectively utilized, then clearly it denies the affected persons due process of law.[35]

Under the Court of Appeal's construction of the statutory provisions, Petitioners have been denied due process of law because they have suffered a deprivation of their property without pre-deprivation notice or time to respond and without a post-deprivation remedy. As an agent of the state, the MARSHAL has a duty to refrain from acting unless and until the constitutional requirements of notice and a reasonable opportunity to respond have been met. The Court of Appeal's decision sanctioning the MARSHAL's conduct is contrary to this minimal constitutional procedural protection and should not be allowed to stand.

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[34] *Id.*

[35] *Id.*, App. 49.

B. Petitioners Have Been Denied the Post-Deprivation Remedies Referenced by the Court of Appeal.

The Court of Appeal's majority opinion referenced three statutory provisions which purportedly provide Petitioners a means to seek post-deprivation redress.[36] However, as the Court of Appeal itself recognizes, those statutes only provide a remedy if the MARSHAL has failed to comply with the provisions of the Enforcement of Judgments Law.[37] Under the Court of Appeal's interpretation of the statutes, the MARSHAL acted in accord with the Enforcement of Judgments Law in selling Petitioners' property in the absence of service of the creditor's bond on Petitioners. Thus, under the Court of Appeal's interpretation and application of the Enforcement of Judgments Law, Petitioners have no post-deprivation remedy other than a due process claim.[38]

C. The Existence of Other Pre-Sale Alternatives Is Irrelevant to the Constitutional Issue Presented.

The Court of Appeal also referenced several pre-sale alternatives which were available to Petitioners.[39] As Justice Wiener correctly noted, it is hard to understand how Petitioners can be expected to effectively utilize those alternatives within a 23-minute time span where they were uninformed of any reason to do so. Moreover, the existence of other potential pre-sale alternatives is irrelevant to the constitutional question presented in this Petition.

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[36] Court of Appeal opinion, App. 43 – App. 44.

[37] Court of Appeal opinion, App. 44.

[38] Court of Appeal opinion, App. 38.

[39] *See, e.g.*, Court of Appeal opinion, App. 44.

While the Enforcement of Judgments Law provides various other procedures for third-party claimants to protect their interests, there is no dispute that it provides the protective mechanism upon which Petitioners relied. That is, there is no dispute that the Enforcement of Judgments Law provides that a third-party claimant may file a third-party claim without a bond; such a third-party claim prevents the execution sale unless and until the creditor files a bond; the creditor's bond must be served on the third-party claimant and filed with a proof of service; and the third-party claimant may then file a responsive bond in an amount matching the creditor's bond and thereby release the property from levy, preventing the sale.

Neither the Constitution nor the statutes themselves require Petitioners to follow more than one available statutory procedure. Nor does the Constitution or the Enforcement of Judgments Law provide that following one procedure waives the availability of others. Rather, the availability of other alternative procedures has no relevance to the fact that Petitioners have been denied due process through the actions of the MARSHAL under the Enforcement of Judgments Law as interpreted and applied by the Court of Appeal.

D. The State Cannot Avoid Responsibility for Denial of Due Process by Delegating the Task of Providing Notice.

Certainly the Court of Appeal would not have affirmed the judgment in favor of the MARSHAL if the statutes in question expressly required the MARSHAL to personally serve the creditor's bond on Petitioners. The

result should be no different merely because the statutes require a private party to effect service. Regardless of who is to serve the bond, service is a fundamental prerequisite for an execution sale to comply with minimal due process requirements, and if the MARSHAL conducts a sale in the absence of service, due process is denied.

The statutes at issue are like many common statutory schemes which delegate to private parties the task of providing constitutionally required notice and require proof that such notice has been given. Examples include requirements that private parties undertake service of lawsuits and pleadings and file a proof of service with the court; that private parties serve orders such as restraining orders and submit proof of service to the court; that private parties publish notices and provide proof of publication; and that private parties serve various types of bonds and file them with proof of service.

The Constitution precludes the state from depriving citizens of property without due process. If the state delegates the task of providing constitutionally required notice to private parties, the state is not permitted to permanently deprive third parties of their property unless such notice is given. For example, if the state requires litigants to serve their pleadings on each other, the state cannot make a binding, final judicial decision in the absence of such service. Similarly, if the state requires that a bond be served by one party on another before the state can act on that bond to deprive a party of its property, the state cannot carry out the deprivation unless such notice is first given. If the state acts in the

absence of notice, it deprives the injured party of property without due process of law in violation of the Constitution of the United States, and that party must be permitted to seek recovery from the state for the resulting harm.

E. The Authority Relied on by the Court of Appeal Does Not Support Its Decision.

The Court of Appeal relied on *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled in part in *Daniels v. Williams*, 474 U.S. 327 (1986). In *Parratt*, the Court determined that where the petitioner had an adequate post-denial remedy under state law and made no contention that the state's procedures were themselves inadequate or that it was practicable for the state to provide a pre-deprivation hearing, there was no denial of due process.

Parratt is readily distinguishable from Petitioners' claim and the statutes on which it is based. First, since the sale of Petitioners' property is final and the Court of Appeal has affirmed the Superior Court's sustaining of the MARSHAL's demurrer without leave to amend, Petitioners have no post-deprivation remedy. Second, it was imminently practicable for the state to provide a pre-deprivation process to protect Petitioners. In fact, that is exactly what the California legislature intended to do. Finally, Petitioners do contend that the statutory procedures as interpreted and applied by the Court of Appeal are inadequate. This is the very essence of Petitioners' due process claim.

The Court of Appeal also relied on *Slaughter v. Legal Process & Courier Service*, 162 Cal.App.3d 1236 (1984).

Slaughter is not a United States Supreme Court decision, but a decision from California's intermediate appellate court. The *Slaughter* court held there was no private cause of action for denial of due process where a default judgment was entered on the basis of a process server's false affidavit of service because:

> In the present case, as in *Parratt v. Taylor*, appellant has not alleged that the statutory procedures are deficient. Also, unlike in *Parratt*, no deprivation has occurred. Appellant successfully availed himself of the opportunity provided by law to set aside the default judgment and to obtain a trial on the merits.

162 Cal.App.3d 1236, 1246. In other words, in *Slaughter* not only was a post-deprivation hearing available, the plaintiff had taken advantage of it and won.

Here, unlike *Slaughter*, there is no post-deprivation hearing that could make Petitioners whole. In fact, the loss of that hearing right was one consequence of Respondents' wrongful conduct. In addition, unlike *Slaughter*, Petitioners did lose valuable property rights. *Slaughter* is not on point because a cause of action for denial of due process is Petitioners' only remedy, Respondents' actions having effectively denied Petitioners of all others.

Neither *Parratt* nor *Slaughter* apply to this case or support the Court of Appeal's decision. Rather, Petitioners have suffered an actionable deprivation of property without due process.

CONCLUSION

For the reasons set forth above, this Petition should be granted. If the Court of Appeal's interpretation and application of the statutes in question are correct, then Petitioners have been deprived of a valuable property right without due process.

Respectfully submitted,

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APPENDIX

Section 701.680. *Binding Effect of Sale.*[1]

(a) Except as provided in paragraph (1) of subdivision (c), a sale of property pursuant to this article is absolute and may not be set aside for any reason.

(b) If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment.

(c) If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason:

(1) An action may be commenced within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor. Subject to paragraph (2), if the sale is set aside, the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor is entitled to interest on the amount of the judgment as so revived as if the sale had not been made.

(2) The judgment debtor may recover damages caused by the impropriety. If damages are recovered against the judgment creditor, they shall be offset against the judgment to the extent the judgment is not satisfied. If damages are recovered against the levying officer, they shall be applied to the judgment to the extent the judgment is not satisfied.

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[1] All statutes set forth in the appendix are from the California Code of Civil Procedure, 1984 edition.

Section 720.110. *Cases in Which Third-Party Claim Is Allowed.*

A third person claiming ownership or the right to possession of property may make a third-party claim under this chapter in any of the following cases if the interest claimed is superior to the creditor's lien on the property:

(a) Where real property has been levied upon under a writ of attachment or a writ of execution.

(b) Where personal property has been levied upon under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale.

Section 720.120. *When Third-Party Claim Is to Be Made.*

A person making a third-party claim under this chapter shall file the claim with the levying officer, together with two copies of the claim, after levy on the property but before the levying officer does any of the following:

(a) Sells the property.

(b) Delivers possession of the property to the creditor.

(c) Pays proceeds of collection to the creditor.

Section 720.130. *Execution and Contents of Third-Party Claim.*

(a) The third-party claim shall be executed under oath and shall contain all of the following:

(1) The name of the third person and an address in this state where service by mail may be made on the third person.

(2) A description of the property in which an interest is claimed.

(3) A description of the interest claimed, including a statement of the facts upon which the claim is based.

(4) An estimate of the market value of the interest claimed.

(b) A copy of any writing upon which the claim is based shall be attached to the third-party claim. At a hearing on the third-party claim, the court in its discretion may exclude from evidence any writing a copy of which was not attached to the third-party claim.

Section 720.140. *Service of Claim, and Other Papers, on Creditor and Debtor – Time of Making Objection.*

(a) Not later than five days after the third-party claim is filed with the levying officer, the levying officer shall serve the following personally or by mail on the creditor:

(1) A copy of the third-party claim.

(2) A statement whether the third person has filed an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610).

(3) If the third person has filed an undertaking to release the property, a notice that the property will be released unless, within the time allowed as specified in the notice, the creditor objects to the undertaking.

(4) If the third person has not filed an undertaking to release the property, a notice that the property will be released unless, within the time allowed as specified in the notice, the creditor files with the levying officer an undertaking that satisfies the requirements of Section 720.160.

(b) The time allowed the creditor for objecting to the third person's undertaking to release the property or for filing an undertaking is 10 days after service under subdivision (a).

(c) Within the time allowed for service on the creditor under subdivision (a), the levying officer shall serve a copy of the papers specified in subdivision (a) on the debtor. Service shall be made personally or by mail.

(d) The levying officer may serve the copy of the third-party claim and the statement and notice pursuant to this section notwithstanding any defect, informality, or insufficiency of the claim.

Section 720.150. *Actions of Levying Officer Prohibited on Timely Filing of Claim – Effect on Third Party's Interest When No Claim Filed.*

(a) Except as otherwise provided by statute, if a third-party claim is timely filed, the levying officer may not do any of the following with respect to the property in which an interest is claimed:

(1) Sell the property.

(2) Deliver possession of the property to the creditor.

(3) Pay proceeds of collection to the creditor.

(b) The interest of the third person in the property levied upon is not affected by the third person's failure to file a third-party claim under this chapter.

Section 720.160. *Execution of Writ in Timely Filing of Undertaking by Judgment Creditor – Requirements of Undertaking – Procedure When Judgment Creditor Is Public Entity Exempt From Undertaking.*

(a) If the creditor files with the levying officer an undertaking that satisfies the requirements of this section within the time allowed under subdivision (b) of Section 720.140:

(1) The levying officer shall execute the writ in the manner provided by law unless the third person files an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610).

(2) After sale, payment, or delivery of the property pursuant to the writ, the property is free of all claims of the third person for which the creditor has given the undertaking.

(b) Subject to Section 720.770, unless the creditor elects to file an undertaking in a larger amount, the amount of the undertaking filed by the creditor under this section shall be in the amount of:

(1) If the action is pending or the judgment was entered in the superior court, seven thousand five hundred dollars ($7,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

(2) If the action is pending or the judgment was entered in a municipal or justice court, two thousand five hundred dollars ($2,500), or twice the amount of the execution lien as of the date of levy or other enforcement

lien as of the date it was created, whichever is the lesser amount.

(c) An undertaking given by the creditor under this chapter shall:

(1) Be made in favor of the third person.

(2) Indemnify the third person against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings.

(3) Be conditioned on a final judgment that the third person owns or has the right of possession of the property.

(d) If the creditor is a public entity exempt from giving an undertaking, the public entity shall, in lieu of filing the undertaking, file with the levying officer a notice stating that the public entity opposes the claim of the third person. When so filed, the notice is deemed to satisfy the requirement of this section that an undertaking be filed.

Section 720.610. *When Third Person May Give Undertaking to Release Property.*

A third person may give an undertaking to release property pursuant to this chapter in the following cases:

(a) Where the third person claims ownership or the right to possession of real property that has been levied upon under a writ of attachment or a writ of execution.

(b) Where the third person claims ownership or the right to possession of personal property that has been levied upon under a writ of attachment, a writ of execution, or a writ of sale.

(c) Where the third person claims a security interest in or a lien on personal property that has been levied upon under a writ of attachment, a writ of execution, or a writ of sale.

Section 720.620. *When Undertaking Is to Be Filed.*

The third person shall file the undertaking to release property with the levying officer, together with two copies of the undertaking:

(a) At the time the third person files a third-party claim pursuant to Chapter 2 (commencing with Section 720.110) or Chapter 3 (commencing with Section 720.210).

(b) If the third person has previously filed a third-party claim to the property, at any time before the levying officer does any of the following:

(1) Sells the property.

(2) Delivers possession of the property to the creditor.

(3) Pays proceeds of collection to the creditor.

Section 720.630. *Contents and Amounts of Undertaking.*

(a) The undertaking to release property shall contain a description of the property to be released and shall describe the interest of the third person.

(b) The undertaking shall be made in favor of the creditor and shall provide that, if the debtor is finally adjudged to have an interest in the property levied upon, the third person shall pay to the creditor the lesser of the following:

(1) The amount required to satisfy the judgment against the debtor of the creditor who had the lien on the property.

(2) A sum equal to the market value of the debtor's interest in the property levied upon.

(c) Except as provided in subdivision (d) and unless the third person elects to file an undertaking in a larger amount, the amount of the undertaking shall be the lesser of the following amounts:

(1) Twice the market value of the property sought to be released.

(2) Twice the amount of the creditor's lien on the property sought to be released.

(d) If the creditor has given an undertaking in response to the third person's claim regarding the property pursuant to Section 720.160 or 720.260, the third person's undertaking shall be in the amount of the creditor's undertaking.

Section 720.660. *Release of Property in Absence of Timely Objection.*

The levying officer shall release the property described in the third person's undertaking in the manner provided by Section 720.170 promptly after the expiration of the time allowed under subdivision (b) of Section 720.760 for objecting to the undertaking, unless the creditor has objected to the undertaking, and filed with the levying officer a copy of the notice of motion as required by subdivision (b) of Section 720.760, prior to the expiration of that time.

Section 995.020. *Applicability of Chapter.*

(a) The provisions of this chapter apply to a bond or undertaking executed, filed, posted, furnished, or otherwise given as security pursuant to any statute of this state, except to the extent the statute prescribes a different rule or is inconsistent.

(b) The provisions of this chapter apply to a bond or undertaking given at any of the following times:

(1) On or after January 1, 1983.

(2) Before January 1, 1983, to the extent another surety is substituted for the original surety on or after January 1, 1983, or to the extent the principal gives a new, additional, or supplemental bond or undertaking on or after January 1, 1983.

Except to the extent provided in this section, the law governing a bond or undertaking given before January 1, 1983, is the law applicable to the bond or undertaking immediately before January 1, 1983, pursuant to Section 414 of Chapter 517 of the Statutes of 1982.

(c) The provisions of this chapter do not apply to a bail bond or an undertaking of bail.

Section 995.370. *Service of Copy of Bond on Beneficiary.*

At the time a bond is given, the principal shall serve a copy of the bond on the beneficiary. An affidavit of service shall be given and filed with the bond.

Section 995.910. *Applicability of Article.*

This article governs objections to a bond given in an action or proceeding.

Section 995.920. *Grounds for Objection to Bond Given in Action or Proceeding.*

The beneficiary may object to a bond on any of the following grounds:

(a) The sureties are insufficient.

(b) The amount of the bond is insufficient.

(c) The bond, from any other cause, is insufficient.

Section 995.930. *Objection by Noticed Motion – Time for Objecting to Bond – Waiver of Objections.*

(a) An objection shall be in writing and shall be made by noticed motion. The notice of motion shall specify the precise grounds for the objection. If a ground for the objection is that the amount of the bond is insufficient, the notice of motion shall state the reason for the insufficiency and shall include an estimate of the amount that would be sufficient.

(b) The objection shall be made within 10 days after service of a copy of the bond on the beneficiary or such other time as is required by the statute providing for the bond.

(c) If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except upon a showing of changed circumstances.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TOTAL CONDO CONCEPTS, INC. et al.,	)	
Plaintiffs and Appellants,	)	
v.	)	D009445
COUNTY OF SAN DIEGO et al.,	)	(Super. Ct.
Defendants and Respondents.	)	No. 540558)

APPEAL from a judgment of the Superior Court of San Diego County, Michael I. Greer, Judge. Affirmed.

Plaintiffs Total Condo Concepts, Inc. (TCC), and Stewart Title Guaranty Company appeal a judgment dismissing their lawsuit against defendants County of San Diego and its Marshal, Michael Sgobba (together defendants) after the superior court sustained defendants' demurrers without leave to amend. We affirm the judgment.

I

FACTS

For purposes of determining the propriety of the order sustaining defendants' demurrers, we state the facts as alleged by plaintiffs. Essentially, plaintiffs (a third party claimant and a title insurer) assert the Marshal should be liable to plaintiffs for failing to follow statutory

requirements in conducting an execution sale of real property on behalf of a judgment creditor.

In September 1981, in San Diego Superior Court case number 473405, Michetti and Cornelius (M&C) caused levy of a writ of attachment on Pacific Beach property consisting of 26 condominiums (the property).

In October 1983, M&C obtained a $210,206.01 default judgment against Camelot Bay, Ltd., and Interval Realty (the judgment debtors).

In December 1983, M&C obtained a writ of execution and caused its levy on the property. On December 14, 1983, M&C gave the Marshal instructions stating the property was not a dwelling.

On December 27, 1983, apparently recognizing the units were in fact dwellings, the Marshal gave M&C a notice to creditor of levy on a dwelling under Code of Civil Procedure[1] section 704.750. The notice stated the Marshal would release the property unless M&C applied to the court for an order of sale within 20 days.

On January 13, 1984, the Marshal received from M&C various documents including an unsigned document entitled "Order to Show Cause Regarding Order for Sale of Real Property." That document was not signed by the court, filed with the court or served on anyone. The document caused the Marshal to refrain from releasing the property from levy. (§ 704.750, subd. (a).)

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[1] All statutory references are to the Code of Civil Procedure unless otherwise specified.

On January 23, 1984, M&C filed with the court an order to show cause and related pleadings.

On February 13, 1984, TCC obtained title to the property. Stewart issued insurance policies on the interests of TCC and lienholders.

On February 21, 1984, the hearing scheduled on the order to show cause was ordered off calendar for lack of proof of service on anyone.

On February 22, 1984, M&C filed another order to show cause.

On March 13, 1984, the matter was again ordered off calendar because of lack of service on the occupants (§ 704.770, subd. (b)(2)) and because more than 20 days had passed since the levy. (§ 704.750, subd. (a).)

On March 16, 1984, without notice, M&C obtained an ex parte order the property was not a dwelling. An execution sale was scheduled.

M&C did not determine the names of all lienholders or instruct the Marshal to notify lienholders of the sale. (§ 701.540, subd. (h).) The Marshal did not post notice of sale on each condominium or serve notice of sale on the judgment debtor, TCC or lienholders.

On May 24, 1984, TCC and lienholders filed a third party claim with the Marshal. The Marshal stated filing a third party claim would result in continuance of the sale. The Marshal also told TCC and lienholders they would be notified when a new date and time were set for the sale.

On May 25, 1984, the Marshal served the third party claim on M&C.

On May 29, 1984, about 10:45 a.m., without notice to TCC or lienholders, M&C gave the Marshal a facially invalid undertaking. The Marshal declined to accept that undertaking. M&C then asked the superior court to continue the sale without notice to TCC. The court telephoned the Marshal and ordered the sale postponed until that afternoon at 1 p.m. No written order was presented to the Marshal that day. The Marshal arranged for the sale to proceed at 1 p.m. if M&C filed another undertaking.

On May 29, 1984, at 12:37 p.m., without notice to TCC, M&C presented a $7,500 undertaking to the Marshal for filing. The undertaking had not been served on TCC or lienholders before filing with the Marshal. The undertaking was not accompanied by an affidavit of service on TCC or lienholders. The Marshal accepted the undertaking.

On May 29, 1984, at 1 p.m., the Marshal announced to assembled persons the property would be sold. Tim Lichty bought the property for $211,000, about $275 more than the creditors' bid.

On May 29, 1984, at 4:35 p.m., M&C's undertaking was served on TCC and lienholders.

TCC and lienholders made claims under title insurance policies issued by Stewart. In partial settlement of those claims, Stewart paid Lichty $1,331,000 for his interest in the property obtained at the execution sale. Stewart then transferred that interest to TCC. Stewart paid $9,000 to settle lienholders' claims and $1,080,734.42 to a lender to bring current a note against the property. Stewart also incurred attorney fees and expenses in resolving the

claims. Appraisers valued the property at more than $5,000,000.

II

SUPERIOR COURT PROCEEDINGS

A. Plaintiffs' Second Amended Complaint.

Plaintiffs sued defendants County and Marshal for damages.[2] Plaintiffs' second amended complaint alleged causes of action for negligence, interference with prospective advantage, denial of due process, and negligent conduct of the judicial sale.

In their cause of action for negligence, plaintiffs alleged defendants did not release the property from lien, contrary to statutory requirements; did not serve notice of sale on the judgment debtor, TCC or lienholders; did not notify lienholders of the continued sale date and time; and sold the property in violation of the Enforcement of Judgments Law (§ 680.010 et seq.), the Bond and Undertaking Law (§ 995.010 et seq.), rule 379 of the California Rules of Court, the California Constitution (art. I, § 7) and the United States Constitution (Amend. V; Amend. XIV, § 1).

In its cause of action for interference with prospective advantage, TCC alleged from May 1984 through April 29, 1986, it had a prospective economic relationship with prospective buyers of time-share condominium units; defendants were aware of that prospective business

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[2] Plaintiffs also sued other parties not involved in this appeal.

advantage; without TCC's consent and over its protests, defendants intentionally, recklessly and negligently disrupted that prospective economic relationship; and defendants' acts were designed to disrupt, and in fact disrupted, the prospective economic relationship by rendering TCC unable to market time-share units to prospective buyers.

In their cause of action for denial of due process, plaintiffs alleged defendants acted under color of state law to deprive plaintiffs of their property without due process of law under the United States Constitution.

In their cause of action for negligent conduct of a judicial sale, plaintiffs alleged defendants failed to exercise reasonable care in conducting the judicial sale.

B. Defendants' Demurrer to Second Amended Complaint.

Defendants demurred to plaintiffs' second amended complaint. Defendants asserted plaintiffs did not state a cause of action for negligence or negligent conduct of a judicial sale because the Marshal followed the statutory procedures in selling the property and was thus shielded with statutory immunities. Defendants attacked plaintiffs' claim for interference with prospective advantage as lacking essential allegations the Marshal intentionally engaged in wrongful conduct. Defendants attacked plaintiffs' due process claim as lacking any allegation the statutory provisions for executing on real property were deficient.

After hearing, the court sustained with leave to amend defendants' demurrer to plaintiffs' claim for negligent conduct of the judicial sale. The court sustained without leave to amend defendants' demurrer to the remainder of the second amended complaint.[3]

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[3] The court entered a written order sustaining defendants' demurrer.

The court stated plaintiffs' claim for negligence was barred because defendants had "statutory immunity" in conducting a judicial sale in reliance on the judgment creditor's instructions. Further, defendants had no "statutory duty" to ensure that M&C properly served its undertaking under section 995.370. Additionally, defendants were not liable for any negligent misrepresentations by the Marshal's office clerk regarding statutes about judicial sales. (*Grenell v. City of Hermosa Beach* (1980) 103 Cal.App.3d 864.)

The court stated plaintiffs' claim for interference with a prospective economic relationship was barred because the "alleged acts fail to set forth any wrongdoing of the Marshal, and therefore the County . . . . "

The court stated plaintiffs' claim for violation of due process was barred as lacking any allegation of the inadequacy of the statutory provisions themselves, rather than simply the inadequacy of the acts of officials implementing those provisions. (*Parratt v. Taylor* (1981) 451 U.S. 527; *Slaughter v. Legal Process & Courier Service* (1984) 162 Cal.App.3d 1236.)

The court stated plaintiffs' claim for negligently conducting a judicial sale did not sufficiently specify which acts of defendants were done negligently. The court stated defendants "must know in which acts they failed to exercise reasonable care in conducting a judicial sale of property which proximately caused . . . the damages alleged in the second amended complaint because the Marshal, and consequently the County, may be exempt from liability with regard to specific acts, if they are alleged."

C. Plaintiffs' Third Amended Complaint.

Plaintiffs filed a third amended complaint against defendants. Plaintiffs alleged defendants failed to exercise reasonable care in conducting the judicial sale of the property. Specifically, defendants accepted a facially invalid undertaking not accompanied by the proof of service required under section 995.370 and thus breached their duty under section 720.150 to refrain from selling the property. Defendants also breached their duty to release the property from levy. (§ 704.750, subd. (a).) Plaintiffs' alleged recovery of damages from defendants was authorized under § 701.680, subdivision (c)(2).

D. Defendants' Demurrer to Third Amended Complaint.

Defendants demurred to plaintiffs' third amended complaint. Defendants asserted the pleading failed to state a cause of action because the Marshal and the County followed statutory procedures in selling the property and were thus shielded from liability by statutory immunities. Defendants also asserted the Marshal had no statutory duty to act as guarantor of service of an undertaking.

After hearing, the court sustained defendants' demurrer to plaintiffs' third amended complaint without leave to amend.[4]

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[4] In its written order sustaining defendants' demurrer without leave to amend, the court stated defendants had "statutory immunity" in conducting a judicial sale under the Code

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The court entered judgment dismissing the County and the Marshal from the lawsuit. Plaintiffs appeal.

III

DISCUSSION

Plaintiffs contend their second amended complaint properly pleaded causes of action for negligence, interference with prospective advantage and denial of due process. Plaintiffs also contend their third amended complaint properly pleaded a cause of action for violation of statutory duties. Plaintiffs assert the Marshal should be liable for noncompliance with the statutory requirements of the Enforcement of Judgments Law.

We are unable to discern any material difference between plaintiffs' asserted causes of action for negligence and for violation of statutory duties. We treat those claims as one alleging liability for noncompliance with statutory requirements. We conclude plaintiffs have not adequately pleaded a claim for the Marshal's alleged noncompliance with statutory duties.

We also conclude plaintiffs have failed to allege facts sufficient to constitute causes of action for interference with prospective advantage or denial of due process.

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in reliance on the judgment creditor's instructions. The court also stated defendants had "no statutory duty" to ensure the creditor's undertaking was properly served by the creditor under section 995.370.

A. Alleged Liability of Marshal for Statutory Violations.

Plaintiffs contend they adequately pleaded the Marshal conducted an execution sale in violation of controlling statutory requirements and thus the Marshal should not be immune from liability.

Section 701.680, subdivision (c), provides in part: "If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason: . . . [¶] (2) The judgment debtor, or the judgment debtor's successor in interest, may recover damages caused by the impropriety. . . . If damages are recovered against the levying officer, they shall be applied to the judgment to the extent the judgment is not satisfied."

Section 701.560, subdivision (b), provides: "A levying officer who sells property without giving the required notice is liable to the judgment creditor and the judgment debtor for actual damages caused by failure to give notice."

Section 687.040, subdivision (a), provides in relevant part: "The levying officer . . . is not liable for actions taken in conformance with the provisions of this title [Enforcement of Judgments Law], including actions taken in conformance with the provisions of this title in reliance on information contained in the written instructions of the judgment creditor . . . except to the extent the levying officer . . . has actual knowledge that the information is incorrect."

1. Failure to Release Property From Levy.

Section 704.750, subdivision (a), provides: "Promptly after a dwelling is levied upon . . . , the levying officer shall serve notice on the judgment creditor that the levy has been made and that the property will be released unless the judgment creditor complies with the requirements of this section. Service shall be made personally or by mail. Within 20 days after service of the notice, the judgment creditor shall apply to the court for an order for sale of the dwelling and shall file a copy of the application with the levying officer. If the judgment creditor does not file the copy of the application for an order for sale of the dwelling within the allowed time, the levying officer shall release the dwelling."

Plaintiffs contend their pleadings sufficiently allege the Marshal should be liable for violating section 704.750, subdivision (a), by not releasing the property from levy when M&C did not timely apply for a court order to sell the property. However, plaintiffs misread the statute. Plaintiffs incorrectly state section 704.750, subdivision (a), requires the Marshal to release property from levy if the judgment creditor does not timely apply for a court order to sell the property. Plaintiffs also incorrectly state the statute requires the Marshal to release the property from levy unless he receives a timely, valid order. The statute simply provides the levying officer must release the property from levy if a copy of the creditor's application for

an order to show cause is not filed with the levying officer within the allotted time.[5]

Plaintiffs alleged on December 27, 1983, the Marshal served M&C with the notice to creditor of levy on a dwelling. Plaintiffs also alleged on January 13, 1984 – within section 704.750, subdivision (a)'s time limits – the Marshal received from M&C various documents causing the Marshal to refrain from releasing the property from levy. However, plaintiffs have not alleged the documents received by the Marshal did not constitute a copy of the application for order for sale required under section 704.750. Nor have plaintiffs otherwise alleged no copy of the application was timely filed with the Marshal. The facts alleged do not implicate any duty of the Marshal under that statute to release the property from levy. Thus, the facts alleged are insufficient to constitute a cause of action based upon violation of any such duty.[6]

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[5] Section 704.750, subdivision (a)'s 20-day period for the creditor to apply for the order and file a copy of the application is extended if the levying officer's notice to creditor is served by mail. (§ 684.120; see Cal. Law Revision Com. com., 17 West's Ann. Code Civ. Proc. (1987 ed.) § 704.750, pp. 352-353.) We note the record indicates on December 27, 1983, the Marshal mailed M&C the notice to creditor of levy on a dwelling.

[6] Because plaintiffs have not alleged facts showing the Marshal had a statutory duty to release the property, we need not reach the Marshal's contention he was immune under section 687.040 for acting only in reliance on information contained in the documents received on January 13, 1984, assertedly constituting "written instructions" of the creditor. We also need not reach the import of M&C's representing the property

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2. Failure to Post and Serve Notices.

Section 701.540, subdivision (b), provides: "Not less than 20 days before the date of sale, notice of sale of an interest in real property shall be served, mailed, and posted by the levying officer as provided in subdivisions (c), (d), (e), and (f)." Subdivision (c) requires service of notice of sale on the judgment debtor personally or by mail. Subdivision (d) requires posting of notice of sale in a public place and a conspicuous place on the property. Subdivision (e) requires at the time of posting notice on the property, notice of sale shall be served or service attempted on one occupant of the property. Subdivision (h) requires the levying officer not less than 20 days before the date of sale to mail notice to each lienholder listed in instructions given by the judgment creditor.

Plaintiffs contend their pleadings sufficiently allege the Marshal should be liable for not complying with his duty under section 701.540 – triggered by the court's determination on March 16, 1984, the property was not a dwelling – to post and serve notice of sale. However, defendants correctly note any asserted noncompliance with section 701.540's requirements did not cause the damages alleged by plaintiffs because the third party claim plaintiffs filed indicates plaintiffs knew of the

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was not a dwelling, the Marshal's determining despite such representation the property was a dwelling, and the court's ultimately finding the property was not a dwelling. Further, we need not address the import of the 1984 amendment to section 704.740, subdivision (a), requiring a court order only for sale of "the interest of a natural person in" a dwelling.

pending Marshal's sale. Thus, although section 701.540 imposes a duty on the Marshal to serve notice and section 701.560, subdivision (b), provides a levying officer selling property without giving the required notice may be liable for actual damages caused by failure to give notice, plaintiffs have failed to allege actual damages resulting from the Marshal's failure to give the required notice. Instead, plaintiffs have alleged facts negating any conclusory allegation of damages purportedly resulting from lack of service of notice under section 701.540. According to plaintiffs' pleading, TCC filed a third party claim before the scheduled sale. Thus, TCC had actual notice of the scheduled sale in time to act to protect its rights.

Plaintiffs have not stated a cause of action for the Marshal's alleged noncompliance with duties imposed under section 701.540.

3. Sale Without Proper Undertaking Accompanied by Proof of Service.

A third person claiming an ownership interest in levied property superior to the creditor's lien may file a "third party claim" with the levying officer after levy on the property but before the levying officer sells the property. (§§ 720.110, 720.120.)

The third person may file a third party claim with or without an undertaking. (§ 720.140.)[7] If the third party claimant files an undertaking, the levying officer must

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[7] Nothing in the record suggests TCC filed an undertaking with its third party claim.

release the property unless the creditor successfully objects to the undertaking. (§ 720.140, subd. (a)(3).) If the third person does not file an undertaking to release the property, the levying officer must serve the creditor with notice the property will be released unless the creditor timely files an undertaking satisfying the requirements of section 720.160. (§§ 720.140, subd. (a)(4); 720.170.)

Where a third party claim is filed, the levying officer may not sell the property except under certain circumstances. (§ 720.150, subd. (a)(1).) Where the creditor timely files with the levying officer a satisfactory undertaking, the levying officer must execute the writ and sell the property unless the third person files an undertaking to release the property. (§§ 720.160, subd. (a); 720.610 et seq.) Where the third party claimant has previously filed a third party claim without an undertaking, the time within which the third party claimant may file the undertaking to release the property is "at any time before the levying officer does any of the following: (1) sells the property. . . . " (§ 720.620, subd. (b)(1).) The levying officer must release the property unless the creditor timely objects to the third party's undertaking. (§ 720.660.) The third party claimant may also object to the sufficiency of the creditor's undertaking. (§ 720.710 et seq.;[8] 995.020; 995.910 et seq.)

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[8] Section 720.710, added by Statutes 1985, chapter 41, section 13, provides: "The Bond and Undertaking Law (Chapter 2 (commencing with Section 995.010) of Title 14) applies to a bond given pursuant to this title [Enforcement of Judgments Law], except to the extent this title prescribes a different rule

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Section 995.370 provides: "At the time a bond is given, the principal shall serve a copy of the bond on the beneficiary. An affidavit of service shall be given and filed with the bond."[9]

Plaintiffs contend their pleadings sufficiently allege the Marshal should be liable for violating section 720.150 by selling the property – instead of refraining from selling – after accepting a purported creditor's undertaking not accompanied by the affidavit of service required under section 995.370. Plaintiffs contend the Marshal conducted the sale only 23 minutes after M&C filed its creditor's undertaking and before service of the undertaking on TCC, thus effectively stripping plaintiffs of their rights to object to the creditor's undertaking or post their own. Plaintiffs contend the Marshal's failure to require proof of service before sale deprived TCC of the opportunity to be heard. However, plaintiffs have not alleged an actionable violation against defendants.

Plaintiffs assert the statutory scheme must be reasonably construed as imposing upon the Marshal the duty to check for an affidavit of service and in its absence refrain from accepting the creditor's undertaking and proceeding with the execution sale. However, we find nothing in the statutory scheme imposing on the Marshal

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or is inconsistent." Section 720.710 restates the existing rule of section 995.020 that the Bond and Undertaking Law applies to undertakings by third party claimants. (18 Cal. Law Revision Com. Rep. (1985) p. 363.)

[9] Generally the terms "bond" and "undertaking" are interchangeable. (§ 995.210.)

the mandatory duty to require proof of service of the bond by M&C on TCC. Section 995.370 imposes a duty of service only on the principal (M&C), not on the Marshal. Section 720.160, subdivision (a), states what the levying officer must have in order to execute the writ. Section 720.160, subdivision (a), requires only that an "undertaking" be filed and does not mention proof of service. The Legislature has enacted a comprehensive statutory scheme. We must read the statutes narrowly as imposing liability on the Marshal only for violating a specific statutory requirement. We may not infer the existence of an implied duty – not suggested anywhere in the statutes – for the Marshal to refrain from accepting the creditor's undertaking absent a proof of service.

Because the levying officer has no statutory duty to refrain from accepting the creditor's undertaking and proceeding with the execution sale if the undertaking is not accompanied by proof of service, plaintiffs may not base a cause of action on the Marshal's noncompliance with such alleged – but nonexistent – duty.

4. Sale Before Time Expired for Plaintiffs to Object to Creditor's Undertaking or Post Their Own Responsive Undertaking.

Asserting they had 10 days to object to M&C's undertaking (§§ 995.910, 995.930, subd. (b))[10] or file their own

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[10] Section 995.910 provides: "This article governs objections to a bond given in an action or proceeding."

Section 995.930 provides:

"(a) An objection shall be in writing and shall be made by noticed motion. The notice of motion shall

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responsive undertaking, plaintiffs contend their pleadings adequately allege the Marshal should be liable for selling the property before expiration of that time period. Asserting the Enforcement of Judgments Law contains no time period – explicit or implicit – during which the Marshal must refrain from sale simply upon filing of the creditor's undertaking, defendants contend the Marshal had no duty or authority to delay the sale after M&C filed its bond unless TCC filed a responsive bond before the sale (§ 720.620, subd. (b)(1)) or otherwise obtained a stay under section 720.380.[11] We agree with defendants. We find nothing in the statutory scheme establishing any time period commencing upon mere filing of the creditor's bond during which the levying officer must refrain from conducting the execution sale.

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specify the precise grounds for the objection. If a ground for the objection is that the amount of the bond is insufficient, the notice of motion shall state the reason for the insufficiency and shall include an estimate of the amount that would be sufficient.

"(b) The objection shall be made within 10 days after service of a copy of the bond on the beneficiary or such other time as is required by the statute providing for the bond.

"(c) If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except upon a showing of good cause for failure to make the objection within the time required by statute or of changed circumstances."

[11] Section 720.380 provides:

"(a) Notwithstanding any other provision of this title, the court may make an order staying the sale of

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The statutory scheme provides the third party claimant with the opportunity to object to the creditor's undertaking. Under section 995.930, subdivision (b), TCC was entitled to object to M&C's undertaking within 10 days after its service on TCC.[12] Section 720.160, subdivision (a)'s reference to a creditor's "undertaking that satisfies the requirements of this section" also contemplates an

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> the property under a writ or enjoining any transfer or other disposition of the property levied upon under a writ until proceedings for the determination of the rights of a third person can be commenced and prosecuted to termination and may require such undertaking as it considers necessary as a condition for making the order.
>
> "(b) After the filing of a third-party claim, notwithstanding Sections 720.160 and 720.260, the creditor, the debtor, or the third person may apply to the court for an order staying the sale of the property under a writ or enjoining any transfer or other disposition of the property until proceedings under this article can be commenced and prosecuted to termination. The application shall be made on noticed motion if the court so directs or a court rule otherwise so requires. Otherwise, the application may be made ex parte.
>
> "(c) An order made pursuant to this section may be modified or vacated by the court at any time prior to the termination of the proceedings upon such terms as are just."

[12] Objection is generally waived if not made within that statutorily prescribed time. (§ 995.930, subd. (b).)

occasion to challenge that undertaking. However, nothing in the statutory scheme requires the levying officer to refrain from conducting the execution sale during that 10-day period. The mere fact the third party claimant is allowed 10 days to object to the creditor's undertaking does not stay the sale. Instead, the third party claimant may stop the scheduled sale by filing its own undertaking to release the property (§§ 720.160, subd. (a)(1); 720.620, subd. (b)(1)) or obtaining a court order under section 720.380.

As noted, the statutory scheme also provides the third party claimant with the opportunity to file its own undertaking to release the property at any time before the levying officer sells the property. (§§ 720.160, subd. (a)(2); 720.610 et seq.) However, where the creditor has filed an undertaking, the statutes do not grant the third party any specific time period to file a responsive undertaking during which time the Marshal must refrain from selling the property. Instead, section 720.620 simply provides the third party claimant may file an undertaking when it files its third party claim or at any time before the levying officer sells the property. Plaintiffs contend under rules of statutory interpretation and due process the statutes must be construed as providing a reasonable period for the third party to file a responsive bond during which time the levying officer may not sell the property. We disagree. The Legislature has enacted a comprehensive statutory scheme. We may not infer the existence of an implied "reasonable" period – not suggested anywhere in the statutes – during which the third party claimant may file a responsive bond and the Marshal must refrain from conducting the execution sale. The third party claimant

may file its undertaking at the time it files its third party claim or at any later time before the levying officer sells the property. By not filing its undertaking at the time of filing the third party claim or before the creditor files its undertaking,[13] the third party claimant takes the risk the property may be sold before the third party claimant can act to stop the sale. Further, the third party claimant has available the option of seeking a stay of the sale under section 720.380.

Because the levying officer has no statutory duty to refrain from selling the property during the period where the third party claimant may object to the creditor's undertaking or file its own responsive undertaking, plaintiffs may not base a cause of action on the Marshal's

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[13] The required amount of the third party undertaking to release the property differs according to when the third party undertaking is filed. Under section 720.630, subdivision (c), the amount of the third party undertaking is the lesser of "[t]wice the market value of the property sought to be released" or "[t]wice the amount of the creditor's lien on the property sought to be released." However, where the creditor has given an undertaking under section 720.160 responding to the third party claim, the third person's undertaking must be in the amount of the creditor's undertaking. (§ 720.630, subd. (d).)

Such required amounts may differ markedly. Under the circumstances here, the amount of M&C's creditor's undertaking would ordinarily be $7,500. (§ 720.160, subd. (b)(1).) Thus, the amount of TCC's responsive undertaking under section 720.630, subdivision (d), would also be $7,500. However, if TCC had filed a third party undertaking before M&C filed a creditor's undertaking, the bond amount required of TCC under section 720.630, subdivision (c)(2), would have exceeded $400,000.

noncompliance with such alleged – but nonexistent – duty.

5. Sale Before Time Expired for Plaintiffs to Seek Judicial Hearing on Their Third Party Claim.

Plaintiffs contend their pleadings adequately allege the Marshal should be liable for selling the property before expiration of the statutory time for plaintiffs to request a judicial hearing on their third party claim. (§ 720.310.)[14] Asserting they had until June 8, 1984, to request a hearing after filing their third party claim on May 24, 1984, plaintiffs contend the Marshal deprived them of their right to request a presale hearing by conducting the sale on May 29, 1984, only five days after their third party claim was filed.[15] However, nothing in section 720.310 et seq. imposes a duty on the Marshal to refrain from conducting an execution sale during the period the third party may apply for a hearing on the third party claim. Indeed, the existence of section 720.380 – authorizing application to the court to stay the sale – contemplates the contrary.

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[14] Section 720.310, subdivision (a) provides: "Not later than 15 days after the third-party claim is filed with the levying officer pursuant to Section 720.120 or 720.220, or 15 days after filing an undertaking pursuant to Section 720.610, either the creditor or the third person may petition the court for a hearing to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the claim."

[15] Ultimately – after the execution sale – the court denied TCC's third party claim. The court found M&C's execution lien was superior to any interest of TCC in the property.

Because the levying officer has no statutory duty to refrain from selling the property during the statutorily specified period for the third party claimant to petition for hearing on the third party claim, plaintiffs may not base a cause of action on the Marshal's noncompliance with such alleged – but nonexistent – duty.

6. Plaintiffs Have Failed to State Claim for Defendants' Alleged Noncompliance With Statutes.

In sum, plaintiffs have failed to allege facts sufficient to state a cause of action based upon the Marshal's asserted noncompliance with statutory duties, whether negligent or otherwise. The superior court properly sustained without leave to amend defendants' demurrers to plaintiffs' purported causes ot action for negligence and violation of statutory duties.

B. Due Process.

In their second amended complaint, plaintiffs alleged defendants acted under color of state law to deprive them of their property without due process of law under the United States Constitution. The superior court sustained defendants' demurrer without leave to amend.

Plaintiffs contend the execution sale here constituted a denial of due process because the Marshal intentionally sold TCC's property without reasonable notice or the opportunity to be heard. Specifically, plaintiffs assert the sale was conducted without service of M&C's creditor's bond on TCC, thus denying TCC notice and opportunity to be heard. Plaintiffs also assert the Marshal deprived

TCC of the right to judicial hearings on the validity of the third party claim and the sufficiency of M&C's undertaking. Finally, plaintiffs contend unless they are allowed to pursue their damage claims against the Marshal, the Enforcement of Judgments Law would sanction unconstitutional conduct by government officials without redress by aggrieved parties. Plaintiffs assert their cause of action for denial of due process is their only remedy. We disagree. Plaintiffs have failed to allege facts sufficient to constitute a cause of action for denial of due process.

In *Parratt v. Taylor, supra,* 451 U.S. 527, overruled on another point in *Daniels v. Williams* (1986) 474 U.S. 327, 330-331, the Supreme Court was faced with the issue whether state tort remedies provided as a means of redress for property deprivations satisfied the requirements of procedural due process. (*Parratt v. Taylor, supra,* at p. 537.) In *Parratt, supra,* at page 542, the court quoted with approval from *Bonner v. Coughlin* (7th Cir. 1975) 517 F.2d 1311, 1319:

> "It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against 'State' deprivations of property; in the latter situation, however, even though there is action 'under color of' state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the

> prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment."

In *Parratt, supra,* at page 543, the court concluded the claimant had not alleged a violation of due process: "Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate . . . . Moreover, the State . . . has provided respondent with the means by which he can receive redress for the deprivation."

In *Slaughter v. Legal Process & Courier Service, supra,* 162 Cal.App.3d at page 1246, the court held a "process server's failure to follow state-prescribed procedures which are proper does not constitute a due process violation." The court noted the claimant did not allege the statutory procedures were deficient. (*Ibid.*) The court also noted the opportunity for redress provided by law "attests to the due process afforded him by the state." (*Ibid.*)

Plaintiffs have not challenged the procedures under the Enforcement of Judgments Law as themselves inadequate. Instead, plaintiffs have merely alleged deprivation resulting from the Marshal's unauthorized failure to follow the statutorily prescribed procedures. As demonstrated by the statutes authorizing this type of lawsuit,

plaintiffs have means to seek redress for such alleged deprivation. (See, e.g., §§ 687.040, subd. (a), 701.560, subd. (b), 701.680, subd. (c).) Plaintiffs have simply failed to allege facts showing any deprivation resulting from the Marshal's noncompliance with any specific statutory requirements. Further, as noted, the statutory scheme provides a third party claimant with means to delay an execution sale pending hearing on the validity of the third party claim and the sufficiency of the creditor's undertaking. (§ 720.380; also § 720.620.) Thus, plaintiffs have failed to state a claim for denial of due process. (*Parratt v. Taylor, supra,* 451 U.S. at pp. 541-543; *Slaughter v. Legal Process & Courier Service, supra,* 162 Cal.App.3d at pp. 1245-1246.)

The superior court properly sustained without leave to amend defendants' demurrer to plaintiffs' purported cause of action for denial of due process.

C. Interference With Prospective Economic Relationship.

The superior court sustained without leave to amend defendants' demurrer to plaintiffs' second amended complaint's cause of action by TCC for interference with prospective advantage. We conclude TCC has not pleaded facts sufficient to constitute a cause of action for interference with prospective advantage.

"[T]he elements of the tort of interference with prospective business advantage are: 1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to

the plaintiff; 2) knowledge by the defendant of the existence of the relationship; 3) intentional acts on the part of defendant designed to disrupt the relationship; 4) actual disruption of the relationship; and 5) damages proximately caused by the acts of defendant." (*Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832, 840-841.)

To be actionable, interference with prospective advantage must be wrongful in the methods used or the actor's purpose or motive. (*Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 661.)

In its cause of action for interference with prospective advantage, TCC alleged from May 1984 through April 29, 1986, it had a prospective economic relationship with prospective buyers of time-share condominium units; defendants were aware of that prospective business advantage; without TCC's consent and over its protests, defendants intentionally, recklessly and negligently disrupted that prospective economic relationship; and defendants' acts were designed to disrupt and in fact disrupted the prospective economic relationship by rendering TCC unable to market time-share units to prospective buyers.

Defendants correctly contend TCC did not allege facts establishing the essential element that the Marshal was intentionally involved in wrongful conduct. Although TCC pleaded defendants "continuously intentionally, recklessly and negligently disrupted and interfered with the prospective economic relationship between [TCC] and said prospective purchasers by committing the acts described herein" and those "acts were designed to,

and in fact did, disrupt said prospective economic relationship by rendering [TCC] unable to market time-share units to such prospective purchasers," those allegations are no more than boilerplate conclusions when viewed in light of TCC's detailed factual allegations about defendants' conduct. Any conclusory allegation of intentional wrongdoing by defendants is belied by those specifically pleaded facts showing any misconduct by defendants was at most negligent. Further, as noted, plaintiffs have failed to allege any actionable misconduct.

The superior court properly sustained without leave to amend defendants' demurrer to TCC's purported cause of action for interference with prospective advantage.

IV

CONCLUSION

Because plaintiffs failed to allege facts sufficient to constitute any cause of action against defendants, the superior court correctly sustained defendants' demurrers without leave to amend and properly entered judgment dismissing defendants from the lawsuit.

DISPOSITION

The judgment is affirmed.

/s/ _____
KREMER, P.J.

I CONCUR:

/s/ _____
FROEHLICH, J.

Wiener, J., concurring and dissenting,

Although I agree with some of the results set out in the majority opinion, I disagree with those conclusions contained in parts A-3 through A-5 and the majority's decision to reject appellants' due process claim (maj. opn., pt. B). I believe the majority's interpretation of the applicable statutes predicated on the unstated premise the Marshal should be immunized from liability nullifies the purpose of the statute by preventing a third party claimant from exercising presale statutory rights. (See 16 Cal. Law Rev. Comm., Rep. 1144 (1982).) Absent legislation granting the Marshal immunity, I believe the statutory scheme must be construed as opposing specific duties on the Marshal resulting in liability to the Marshal where he fails to conform to those requirements in conducting an execution sale.

It is significant here the Marshal's sale was conducted five days after the filing of the third party claim, only twenty-three minutes after the filing of the creditor's bond and three and one-half hours *before* appellants were served with the creditor's bond.

In saying that Code of Civil Procedure section 995.370 imposes a duty of service of the bond only on the principal and the Marshal has no statutory responsibility to determine whether the bond has been so served by requiring the bond be accompanied with an affidavit of service (maj. opn., pt. III A-3), the majority ignores the sentence in that provision which states, "An affidavit of service shall be given and filed with the bond." Obviously the principal was not "filing" the bond with appellants nor with the Marshal. However, section 995.340,

subdivision (b), requires that where the bond is given to an officer, here the Marshal, it is the Marshal's responsibility to file the bond with the court. Thus filing the affidavit with the bond, i.e. the Marshal's statutory responsibility, requires the affidavit of service be delivered to the Marshal. This interpretation is the only interpretation consistent with the legislative intent of affording third-party claimants presale rights. If the proof of service does not accompany the bond delivered to the Marshal, the third party claimant has no assurance that he will receive notice of the undertaking with its concomitant right to object and be heard on the sufficiency of that bond. Interestingly, that is exactly what occurred here.

In addition, in agreeing with the defendants that the Marshal "had no duty or authority to delay the sale after M&C filed its bond unless TCC filed a responsive bond before the sale (§ 720.620, subd. (b)(1)) or otherwise obtained a stay under section 720.380 [fn. omitted]" (maj. opn., pt. III A-4), the majority fails to explain how appellants could have accomplished either of the foregoing in the 23 minutes that ensued after the bond was posted where they had no knowledge of the posting until approximately two hours after the sale was conducted. Aside from the impossibility of exercising their rights in the circumstances of this case, the majority also fails to articulate the rationale as to why the Legislature would have specified time periods within which a third party claimant can act to protect its financial interest before sale while impliedly authorizing the levying officer to ignore

those provisions. Where the Legislature did not see fit to give the Marshal the prerogative to ignore the time periods contained in the various statutory provisions, he should not be given those rights by judicial fiat.

Our obligation to interpret statutes so as to avoid serious constitutional questions is well settled and fundamental. (*In re Kay* (1970) 1 Cal.3d 930, 942.) In enacting the statutory scheme applicable to this case the Legislature was well aware of the relevant due process considerations. It therefore provided for reasonable notice and an opportunity to be heard by those persons who faced the risk of losing property or an interest in property as a result of an execution sale. In my view had the Marshal complied with the statutes here, appellants would not have been denied due process. If my interpretation is flawed, however, and the majority has properly construed the various statutory provisions, then I must conclude appellants are correct in contending they have been denied due process of law. While I agree with the majority that the "statutory scheme provides a third party claimant with means to delay an execution sale pending hearing on the validity of the third party claim and the sufficiency of the creditor's undertaking." (§ 720.380; also § 720.620; maj. opn., pt. III B), I am unable to understand how the majority expects those means to be effectively used within a 23-minute time span where the affected parties were uninformed. If a statutory scheme requires prescience to be effectively utilized, then clearly it denies the affected persons due process of law.

Based on the foregoing, I would reverse the judgment to allow appellants to proceed on their cause of action

alleging the statutory breaches described above. I would affirm the balance of the judgment.

/s/ _____
WIENER, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division One,
No. D009445 S017214

IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA IN BANK

TOTAL CONDO CONCEPTS INCORPORATED Et Al.,
Appellants

v.

COUNTY OF SAN DIEGO Et Al., Respondents

Appellants' petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice

Supreme Court, U.S.
FILED
FEB 26 1991
OFFICE OF THE CLERK

No. 90-1112

In The

Supreme Court of the United States

October Term, 1990

TOTAL CONDO CONCEPTS, INC., and STEWART TITLE GUARANTY COMPANY,

Petitioners,

v.

COUNTY OF SAN DIEGO and MICHAEL SGOBBA, AS MARSHAL OF THE COUNTY OF SAN DIEGO,

Respondents.

Petition For Writ Of Certiorari To the Court Of Appeal For The State Of California, Fourth Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF FACTS

This is a Petition for Certiorari filed by Total Condo Concepts (hereinafter "TCC") and Stewart Title Guarantee Company (hereinafter "Stewart") seeking review of a decision of the California Court of Appeal, Fourth Appellate District, Division One.[1] The case involves twenty-six condominiums which were sold to satisfy a judgment. The sale was conducted by the Marshal of the County of San Diego (hereinafter "Marshal") pursuant to California laws prescribed for the execution, levy and sale of property.

The judgment creditor obtained a default judgment for $210,206.01. The judgment creditor then obtained a writ of execution and caused its levy on the condominiums. Later during the proceedings, but before the sale, TCC acquired the condominiums. Stewart issued defective title insurance on them.

When TCC learned of the impending sale, it filed a "third-party claim" with the Marshal asserting an interest in the condominiums superior to that of the judgment creditor, and seeking to stop the execution sale. The third-party claim was served on the judgment creditor.

As provided by statute, the judgment creditor filed a bond for the benefit of TCC in order to allow the execution sale to proceed. However, the judgment creditor

---

[1] Petition for Writ of Certiorari (hereinafter "Petition") with a copy of the California Court of Appeal unpublished opinion (hereinafter "Opinion") attached in the Appendix, pp. 19-50; the facts set forth therein are accurately stated (Opinion, pp. 19-22 of the Appendix) and briefly summarized here.

failed to follow the statute by not serving TCC with a copy of the bond before filing the original with the Marshal. No proof of service on TCC accompanied the bond as required by statute. The Marshal had no statutory duty to examine the bond, test its validity or verify that it had been properly served on TCC. Accordingly, he accepted the bond and the property was sold.

TCC made claims under the title insurance policy issued by Stewart. In settlement of those claims, Stewart paid to clear title to the property. This action ensued.

STATEMENT OF THE CASE

TCC and Stewart sued the judgment creditor, the judgment creditor's attorneys, the County of San Diego[2] and the Marshal to recoup the amounts spent to clear title to the property and to recoup the profits lost in being unable to market the condominiums. (Opinion, App. 22-24; see also attachment herein.) The trial court sustained the Marshal's demurrer to petitioners' third amended complaint without leave to amend and judgment was entered in favor of the Marshal.

The petitioners proceeded against the judgment creditor and its attorneys, who also filed a cross-complaint against petitioners. As trial approached, petitioners settled with the judgment creditor for a mutual release of all claims between the parties. The case proceeded against

[2] The County's only involvement is by virtue of the acts of the Marshal in this matter. Therefore, Respondents are collectively referred to as "Marshal" unless otherwise indicated.

the judgment creditor's attorneys. After a lengthy jury trial, the trial court granted motions for non-suit by the judgment creditor's attorneys on the main action and on the cross-complaint. (See attached Notice of Motion for Determination of Good Faith Settlement and for an Order Barring Future Claims for Contribution or Indemnity filed by the attorney for the judgment creditor.)[3]

Among the multiple causes of action stated in their underlying complaint, petitioners alleged a cause of action for denial of due process against the Marshal. Petitioners alleged that they were denied due process when the Marshal accepted the judgment creditor's bond without proof of service on TCC.

The California Court of Appeal disagreed, finding that petitioners had not challenged the statutory scheme itself as constituting a denial of due process. (Opinion, App. 43.) Instead, the appellate court found petitioners had alleged deprivation resulting from the judgment creditor and Marshal's failure to comply with the statutory procedure. The appellate court reasoned that since petitioners could have filed their own bond to release the property from sale when the third party claim was filed, adequate state remedies for damages were available to redress that deprivation. (Opinion, App. 39, 43-44). In addition, the appellate court noted petitioners had other available options for seeking a stay of the sale. With all

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[3] After the Marshal obtained judgment in the case, the names of the County and the Marshal were dropped from the case name. The Superior Court case numbers for this case and for the attached motion for good faith settlement are the same, even though the initial defendants' names are different.

these remedies available, there was ample due process available for remedying any notice deficiency.

The California Supreme Court denied review.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. There is No Jurisdictional Basis for Supreme Court Review.

This Court's review is sought pursuant to 28 U.S.C. section 1257(a) (Petition, p. 2). That section authorizes review "where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution . . . ". There is no state statute being drawn into question in this case – only behavior which stems from a judgment creditor's failure to comply with a state statute. Liability was sought to be imposed upon the Marshal for not insuring the judgment creditor's compliance. The Court of Appeal held that the Marshal had no such duty. Other remedies were available. Consequently, there is no federal question for this Court's review. The Petition should be denied.

2. The State Court Decided the Denial of Due Process Issue In Reliance Upon the Applicable Decisions of This Court.

The Supreme Court Rules provide that a petition for writ of certiorari will be granted only when there are "special and important" reasons therefor. (See Supreme Court Rules, Rule 10.1, subsection (c).) In the instant case, the state court has found that the statute itself is not

being challenged constitutionally and that the statute has adequate remedies to satisfy requirements of due process, for failure of the judgment creditor to follow the statutory requirements. This conclusion was reached in reliance upon the decisions of this Court. The granting of a petition for writ of certiorari is not warranted in this case because there are no "special and important" reasons.

This case involves a unique chronology of facts arising under California's Enforcement of Judgments Law. (California Code of Civil Procedure sections 680.010 to 724.260; hereinafter all statutory references are to the California Code of Civil Procedure.) The provisions of this law are set forth at pages 7 and 8 of the Petition. Under this law, a person claiming a superior ownership interest to a judgment creditor seeking to foreclose on real property to satisfy a judgment, may file a "third-party claim" with the Marshal. The third-party claim may be filed with or without a bond. If the third-party claimant files a bond when the claim is filed, the marshal must release the property from sale, and the judgment creditor can take no further steps. (§ 720.140(a)(3)). When a third-party claim is filed without a bond, the marshal may not sell the property unless the judgment creditor files a bond for the benefit of the third-party claimant. (§ 720.160(a)(1); Petition, App. 8.) A copy of the judgment creditor's bond must be served on the third-party claimant and be accompanied by an affidavit of service when it is filed. (§ 995.370.)

If the judgment creditor serves and files a bond in an effort to have the real property sold, the third-party claimant may file a counter-bond which releases the property from levy. (§§ 720.160(a)(1), 720.610-720.630;

App. 8-9, App. 10-12.) This counter-bond may be filed at any time before the levying officer sells the property. (§ 720.620(b)(1); Petition, App. 11.)

In this case, the petitioners filed the third-party claim without a bond. Petitioners took a risk that, upon presentation of a judgment creditor's bond to the Marshal, they could file a counter-bond before the property was sold. The Marshal is not a "guarantor" of service of an undertaking – i.e. the Marshal is not required to guarantee that the judgment creditor's undertaking was properly served by the judgment creditor on the judgment debtor pursuant to section 995.370. (Opinion, App. 26-27, fn. 4.) This case does not present any special or important reasons for this Court to grant review. The Petition should be denied.

3. A Claim For Violation of Due Process Does Not Lie Because Plaintiffs Have Not Challenged the Enforcement of Judgments Law as Being Unconstitutional.

In this case, the state court determined quite correctly that petitioners did not challenge the Enforcement of Judgments Law as being unconstitutional. Instead, petitioners merely alleged deprivation of property rights resulting from the Marshal's alleged failure to follow the statutorily prescribed procedure. (Opinion, App. 43.) As this Court stated in *Parratt v. Taylor*, 451 U.S. 527 (1981):

> "Its seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against

> 'State' deprivations of property; in the latter situation, however, even though there is action 'under color of' state laws sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiffs' entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment."

In *Parratt, supra,* at page 543, this Court concluded that the claimant had not correctly alleged a violation of due process:

> "Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate. . . . Moreover, the State . . . has provided respondent with the means by which he can receive redress for the deprivation." (See Opinion, App. 42-43.)

The Court of Appeal determined that petitioners had not stated a cause of action for denial of due process under the federal constitution. (Opinion, App. 41-44.) It held that petitioners' alleged deprivation resulted from the Marshal's conduct, not from the statutory provisions. The Court noted that petitioners had a means of redress for the alleged deprivation. (See §§ 687.040(a), 701.560(b),

701.680(c); Opinion, App. 43-44.) The Court obviously held the *Parratt* decision to be directly applicable to the facts of this case.

4. Due Process Does Not Require That the Marshal Be a Guarantor of Notice Under the Statute.

Petitioners allege they suffered deprivation of their property without prior notice and the opportunity to respond. (Petition, p. 5.) Petitioners assert that the Marshal, as an agent of the State, has a duty to refrain from acting until he has satisfied requirements of notice. (Petition, p. 10.) Petitioners also assert that regardless of who is to serve the bond, if the Marshal conducts the sale in the absence of service, due process is denied. (Petition, p. 12.) This common theme runs throughout the Petition.

No case has been found which requires the Marshal to personally insure that notice has been given. In no decision of this Court has a public officer had the ultimate responsibility to verify, before acting, that private parties have properly given notice to others. On the contrary, this Court has specifically approved statutory procedures in which notice requirements were delegated to private parties without any provision requiring a public officer to verify compliance by the private party. (See *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1949); *Tulsa Collection Servs. v. Pope*, 485 U.S. 478 (1988); *Nelson v. New York*, 352 U.S. 103 (1956).) The law should presume that private parties will comply with statutory requirements. If they don't, the resulting liability should remain with the private parties, not shifted to public

officers for not verifying compliance. Applying this principle to this case, the Marshal should not be required to guarantee service of notice by the judgment creditor. He should not have to guarantee that service has been accomplished by others who themselves should be expected to comply with state statutes. This Court has previously held this to be the law. The issue needs no review and the Petition should be denied.

5. The Fundamental Requirement of Due Process is the Opportunity to Be Heard. Petitioners' Due Process Rights Were Satisfied.

In *Mullane v. Central Hanover Bank and Trust Co., supra,* at p. 314, this Court reiterated the principle " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean* (1914) 234 U.S. 385, 394. . . . " Petitioners in this case had notice and also exercised their opportunity to be heard by filing a third-party claim when their interest was placed in jeopardy by a possible execution sale. This Court has noted that an owner of property must be at least minimally vigilant in protecting his property. "The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights." (*Mullane, supra,* at p. 316.) In quoting from Chief Justice Marshal in *The Mary, Stafford, Master,* U.S. 9 Cranch 126, 144 [3 L.Ed. 678, 684] (1815) " 'It is the part of common prudence for all those who have any interest in [a thing] to guard that interest by persons who are in a situation to protect it.' " (*Mullane, supra,* at p. 316.)

Petitioners had notice and exercised their opportunity to be heard. Their due process rights have been met. Indeed, the court ultimately denied petitioners' third-party claim, finding the execution lien was superior to any interest of Petitioner in the property. (Petition, Opinion, App. 40, fn. 15.) Petitioners state no special and important reasons for review by this Court. The Petition should be denied.

CONCLUSION

For the reasons set forth above, the Petition should be denied. A claim for denial of due process does not lie. The Marshal is not required to guarantee that a judgment creditor comply with statutory notice requirements. In addition, petitioners had abundant opportunity to be heard and their due process rights were satisfied.

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

TOTAL CONDO CONCEPTS, INC., a California corporation; and STEWART TITLE GUARANTY COMPANY, a Texas corporation, Plaintiffs, vs. MARIO MECHETTI and RUSSELL CORNELIUS, individually and doing business as MICHETTI AND CORNELIUS ADVERTISING; STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR, a partnership including professional corporations and DOES 1 through 200, inclusive, Defendants.	Case No. 540558 NOTICE OF MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT AND FOR AN ORDER BARRING FUTURE CLAIMS FOR CONTRIBUTION OR INDEMNITY Date: September 28, 1990 Time: 10:30 a.m. Dept: 31 (Telephonic Ruling) Judge Ben Hamrick

STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR,

Cross-Complainants,

vs.

TOTAL CONDO CONCEPTS, INC., a California Corporation, and STEWART TITLE GUARANTY CO., a Texas corporation, WILLIAM PETTERSON, AMERICAN SAVINGS & LOAN ASSOCIATION, AMERICAN REAL ESTATE ASSOCIATES ("AREA"), JOHN F. KULLERSTRAND AND ROES 201-300, inclusive,

Cross-Defendants.

TO ALL PARTIES, THEIR ATTORNEYS OF RECORD AND ALL OTHERS:

PLEASE TAKE NOTICE that on September 28, 1990 at 10:30 a.m. or as soon thereafter as the matter may be heard before the Honorable Ben Hamrick in Department 31 of the above-entitled court located at 220 West Broadway, San Diego, California defendants STEVEN L. VICTOR, RUDICK, PLATT & VICTOR and STEVEN L. VICTOR, A.P.C., will move this court for an order of determining that the settlement entered into between plaintiffs and attorney defendants was made in good faith and for an order barring future claims by the parties

and all other persons and entities against attorney defendants, and their agents, for indemnity or contribution arising out of the transaction referenced in the above-captioned action.

This motion is based upon California Code of Civil Procedure Sections 877.6, the memorandum of points and authorities submitted herewith, the declaration of Janice Gay Gibbons and the pleadings and records on file in this action.

DATED: September 4, 1990

LEWIS, D'AMATO, BRISBOIS & BISGAARD

By: /s/ Janice Gay Gibbons
JANICE GAY GIBBONS
Attorneys for Defendants and Cross-Complainants STEVEN L. VICTOR; RUDICK, PLATT & VICTOR; and STEVEN L. VICTOR, A.P.C.

PROOF OF SERVICE

San Diego Superior Court

Case No: 540558

I, the undersigned, am over the age of eighteen years and am a resident of San Diego County, California; I am not a party to the above-entitled action; my business address is 550 West C Street, Suite 800, San Diego, California 92101.

On September 4, 1990, I served the following document(s):

NOTICE OF MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT AND FOR AN ORDER

BARRING FUTURE CLAIMS FOR CONTRIBUTION OR INDEMNITY; MEMORANDUM OF POINTS AND AUTHORITIES and; DECLARATION OF JANICE GAY GIBBONS IN SUPPORT THEREOF.

addressed to:

Mark Zebrowski, Esq.
Gray, Cary, Ames & Frye
401 B Street, Ste 1700
San Diego, CA 92101

Murry M. Bankhead, Esq.
Solomon, Ward,
Seidenwurm & Smith
401 B Street, Ste 1200
San Diego, CA 92101

James Hill, Esq.
Sullivan, Hill, Lewin &
Markham
550 West C Street, Ste 1500
San Diego, CA 92101

Floyd Harmon
County Counsel
355 County Administration
Center
1600 Pacific Highway
San Diego, CA 92101

XX (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at San Diego, California.

___ (BY TELECOPIER) In addition to service by mail as set forth above, the counsel by whose name an asterisk is affixed on the attached service list were also forwarded a copy of said document(s) by telecopier.

___ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 4, 1990, at San Diego, California.

/s/ Valerie M. Biladeau
VALERIE M. BILADEAU

LEWIS, D'AMATO, BRISBOIS & BISGAARD
R. GAYLORD SMITH
JANICE GAY GIBBONS
550 West C Street, Suite 800
San Diego, California 92101
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Attorneys for Defendants and
Cross-Complainants STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR; and STEVEN
L. VICTOR, A.P.C.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

TOTAL CONDO CONCEPTS, INC., a California corporation; and STEWART TITLE GUARANTY COMPANY, a Texas corporation, Plaintiffs, vs. MARIO MECHETTI and RUSSELL CORNELIUS, individually and doing business as MICHETTI AND CORNELIUS ADVERTISING; STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR, a partnership including professional corporations and DOES 1 through 200, inclusive, Defendants.	Case No. 540558 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT AND FOR AN ORDER BARRING FUTURE CLAIMS FOR CONTRIBUTION OR INDEMNITY Date: September 28, 1990 Time: 10:30 a.m. Dept: 31 (Telephonic Ruling) Judge Ben Hamrick

STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR,

Cross-Complainants,

vs.

TOTAL CONDO CONCEPTS, INC., a California Corporation, and STEWART TITLE GUARANTY CO., a Texas corporation, WILLIAM PETTERSON, AMERICAN SAVINGS & LOAN ASSOCIATION, AMERICAN REAL ESTATE ASSOCIATES ("AREA"), JOHN F. KULLERSTRAND AND ROES 201-300, inclusive,

Cross-Defendants.

I. INTRODUCTION

Defendants, STEVEN L. VICTOR; RUDICK, PLATT & VICTOR; and STEVEN L. VICTOR, A.P.C. (hereinafter "Rudick") have brought this motion for an order determining that the settlement of the above-entitled action is in good faith and discharges defendants from any and all liability for total, partial or comparative indemnity or contribution pursuant to the provisions of Sections 877 and 877.6 of the California Code of Civil Procedure.

II. STATEMENT OF FACTS

The plaintiffs' causes of action for fraud and abuse of process against Rudick came to trial on January 14, 1990

in Department 31 of the above-entitled court, the Honorable Ben W. Hamrick, presiding. Prior to the selection of the jury, the court in dealing with motions in limine severed Total Condo Concepts, Inc. from the trial based upon its pending bankruptcy proceeding and also the suspension of its corporate franchise by the State of California.

The case of Stewart Title then proceeded to trial. On February 6, 1990, after the plaintiff had concluded its case in chief and rested, the defendants moved the court for an order granting a nonsuit as to plaintiffs' causes of action for fraud and abuse of process. The court found that there was not sufficient evidence of fraud on the part of the defendants to allow that issue to go to the jury and granted defendants' motion for nonsuit as to that cause of action. The court took the motion for nonsuit as to the cause of action for abuse of process under submission until the completion of the defendants case stating that it wanted to review the authority cited and research the law. The defendants' then put on their case before the jury and all evidence was received and all parties rested on February 7, 1990.

At that time cross-defendant Stewart Title moved the court for an order granting nonsuit as to Rudick's cross-complaint for abuse of process. After further oral argument was presented by counsel as to both motions for nonsuit, the court found that there was no evidence that either party to this action willfully used or misused the processes of the court for any collateral or unrelated improper purpose as required by the California case law and, therefore, the respective motions for nonsuit should be granted. Accordingly, the motions for nonsuit as to the

complaint and the cross-complaint of the respective parties were granted on February 8, 1990.

In February 1990 the plaintiffs settled with co-defendants Mario Michetti and Michetti and Cornelius Advertising resulting in a mutual release of all claims between those parties.

The plaintiffs had also alleged a cause of action against the county of San Diego and its Marshal Michael Sgobba. The court granted a demurrer to these causes of actions, entering a judgment of dismissal in favor of the County and the Marshal. At the time of trial, plaintiffs' appeal as to this judgment was pending. However, on July 19, 1990, the court of appeal rendered its decision upholding the trial court's judgment of dismissal as to these parties.

Total Condo is the debtor in a bankruptcy case pending in the United States Bankruptcy Court for the Southern District of California, Case Number 89-05172-LM11. This settlement with Total Condo Concepts, Inc. is contingent upon an order approving the compromise by the bankruptcy court. The trustee in bankruptcy has submitted an application for the bankruptcy court's approval. Notice of intent to settle this lawsuit was served in the bankruptcy case in August, 1990. This motion is made subject to obtaining the bankruptcy court's approval which is anticipated to be granted on or before September 30, 1990.

III. THE COURT HAS THE AUTHORITY TO DETERMINE THAT THE SETTLEMENT WAS MADE IN GOOD FAITH

Code of Civil Procedure Section 877.6 gives the court discretion to determine whether a settlement by a joint

tortfeasor is made in good faith. Code of Civil Procedure Section 877.6 provides, in pertinent part, as follows:

> (a) "Any party to an action wherein it is alleged that two or more parties are joint tortfeasors . . . shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasor. . . .
>
> (b) The issue of the good faith settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing."

The Rudick defendants hereby request the court, pursuant to Code of Civil Procedure Section 877.6 to make a determination that this settlement was made in good faith.

IV. DETERMINATION THAT A SETTLEMENT IS IN GOOD FAITH IS PROPER WHERE IT IS WITHIN THE REASONABLE RANGE OF DEFENDANTS' PROPORTIONATE SHARE OF LIABILITY, AND MEETS THE TECH-BILT CRITERIA FOR A GOOD FAITH DETERMINATION

In *Tech-Bilt, Inc., v. Woodward, Clyde & Associates,* 38 Cal. 3d 488 (1985), the California Supreme Court recognized that many factors determine whether a settlement is made in good faith pursuant to Code of Civil Procedure Section 877. The *Tech-Bilt* court held that the intent and policies underlying Section 877.6 require that the following factors be taken into account in making a determination of good faith settlement:

1. A rough approximation of plaintiff's total recovery;
2. The settlor's proportionate liability;
3. The actual amount paid in settlement;
4. The recognition that a settlor should pay less in settlement then he would if he were found liable after a trial;
5. The financial condition and insurance policies of the settling defendant; and
6. The existence of collusion, fraud, or tortious conduct aimed at the interests of the nonsettling defendants.

Id. at page 499-500.

The *Tech-Bilt* court indicated that it was enunciating a "reasonable range" test which would leave substantial latitude to the settling parties and discretion to the court. *Id.*, at 500.

In the present action, Rudick's settlement with the plaintiffs falls squarely within the guidelines articulated in *Tech-Bilt*. After hearing the evidence in this matter, but prior to the case being submitted to the jury, the court granted a nonsuit against Stewart Title dismissing the claims altogether. Therefore, it is clear that Rudick's proportionate liability is nil. Further, plaintiffs' claims against all known co-defendants have been resolved without any defendants paying damages to the plaintiffs. Therefore, there are no known parties who would be impacted by this settlement. Clearly, this settlement falls within the *Tech-Bilt* guidelines and it should be determined to be a good faith settlement.

V. THE PARTY ASSERTING THE LACK OF GOOD FAITH HAS THE BURDEN OF PROOF ON THAT ISSUE

The party asserting the lack of good faith has the burden of proving that issue pursuant to California Code of Civil Procedure Section 877.6(d). Further, the party asserting lack of good faith must demonstrate that the settlement is so far "out of the ball part" in relation to the *Tech-Bilt* factors as to be inconsistent with the equitable objectives of Code of Civil Procedures Section 877.6. *Tech-Bilt, Inc. v. Woodward, Clyde & Associates, supra* 38 Cal.3d 499-500. Hence, in the present action, any party opposing this motion for good faith settlement carries the burden of proving that Rudick's settlement is outrageously disproportionate to their liability and inconsistent with the objectives enunciated in *Tech-Bilt*.

The proposed settlement between Rudick and the plaintiffs clearly is within "the ball park" in relation to the aforementioned factors so as to be consistent with the equitable objectives of Section 877.6.

VI. A DETERMINATION THAT THIS SETTLEMENT WAS MADE IN GOOD FAITH BARS ALL CLAIMS FOR INDEMNITY OR CONTRIBUTION

A court determination that a settlement was made in good faith bars other joint tortfeasors from making any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity based on comparative negligence or comparative fault. California Code of Civil Procedure Section 877.6(c). Further, such a determination shall discharge a

tortfeasor to whom it is given from all liability contribution to any other tortfeasor. Code of Civil Procedure Section 877.

Recently the California Supreme Court in *Far West Financial Corporation v. D&S Company, Inc.*, 46 Cal.3d 796, (1988) held that a settlement determined to be in good faith bars a nonsettling tortfeasor from pursuing a claim for total equitable indemnity against a defendant who has entered into a good faith settlement. Therefore, it is clear that not only are causes of action for partial or comparative indemnity barred by a good faith determination, but causes of action for total indemnity, even if liability is based derivatively or vicariously, are barred by a good faith determination.

VII. CONCLUSION

It is respectfully requested that the court enter an order that the proposed settlement is in good faith and that the moving parties be discharged from any and all liability for total, partial or comparative indemnity or contribution in connection with or arising with any claims by the subject matter of any claims raised herein.
DATED: September 4, 1990 LEWIS, D'AMATO, BRISBOIS & BISGAARD

By: /s/ Janice Gay Gibbons
JANICE GAY GIBBONS
Attorneys for Defendants
and Cross-Complainants
STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR;
and STEVEN L. VICTOR, A.P.C.

total.p&a

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Cross-Complainants STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR; and STEVEN
L. VICTOR, A.P.C.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

TOTAL CONDO CONCEPTS, INC., a California corporation; and STEWART TITLE GUARANTY COMPANY, a Texas corporation, Plaintiffs, vs. MARIO MICHETTI and RUSSELL CORNELIUS, individually and doing business as MICHETTI AND CORNELIUS ADVERTISING; STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR, a partnership	Case No. 540558 DECLARATION OF JANICE GAY GIBBONS IN SUPPORT OF DEFENDANTS MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT AND FOR AN ORDER BARRING FUTURE CLAIMS FOR CONTRIBUTION OR INDEMNITY Date: September 28, 1990 Time: 10:30 a.m. Dept: 31 (Telephonic Ruling) Judge Ben Hamrick

including professional corporations and DOES 1 through 200, inclusive,

Defendants.

STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR,

Cross-Complainants,

vs.

TOTAL CONDO CONCEPTS, INC., a California Corporation, and STEWART TITLE GUARANTY CO., a Texas corporation, WILLIAM PETTERSON, AMERICAN SAVINGS & LOAN ASSOCIATION, AMERICAN REAL ESTATE ASSOCIATES ("AREA"), JOHN F. KULLERSTRAND AND ROES 201-300, inclusive,

Cross-Defendants.

I, JANICE GAY GIBBONS, delcare [sic] as follows:

1. I am an attorney at law licensed to practice in the State of California and am an associate of the law firm of Lewis, D'Amato, Brisbois & Bisgaard, attorneys of record for defendants Steven L. Victor, Steven L. Victor, APC., and Rudick, Platt & Victor in the above-captioned case (hereafter "Rudick".) The facts stated below are based on

my review of the pleadings and records in this case and if called as witness, I could competently testify to the following facts.

2. The plaintiffs' causes of action for fraud and abuse of process against Rudick came to trial on January 14, 1990 in Department 31 of the above-entitled court, the Honorable Ben W. Hamrick, presiding. Prior to the selection of the jury, the court in dealing with motions in limine several Total Condo Concepts, Inc. from the trial based upon its pending bankruptcy proceeding and also the suspension of its corporate franchise by the State of California.

3. The case of Stewart Title then proceeded to trial. On February 6, 1990, after the plaintiff had concluded its case in chief and rested, the defendants moved the court for an order granting a nonsuit as to plaintiffs' causes of action for fraud and abuse of process. The court found that there was not sufficient evidence of fraud on the part of the defendants to allow that issue to go to the jury and granted defendants' motion for nonsuit as to that cause of action. The court took the motion for nonsuit as to the cause of action for abuse of process under submission until the completion of the defendants case stating that it wanted to review the authority cited and research the law. The defendants' then put on their case before the jury and all evidence was received and all parties rested on February 7, 1990.

4. At that time cross-defendant Stewart Title moved the court for an order granting nonsuit as to Rudick's cross-complaint for abuse of process. After further oral argument was presented by counsel as to both motions

for nonsuit, the court found that there was no evidence that either party to this action willfully used or misused the processes of the court for any collateral or unrelated improper purpose as required by the California case law and, therefore, the respective motions for nonsuit should be granted. Accordingly, the motions for nonsuit as to the complaint and the cross-complaint of the respective parties were granted on February 8, 1990.

5. In February 1990 the plaintiffs settled with co-defendants Mario Michetti and Michetti and Cornelius Advertising resulting in a mutual release of all claims between those parties.

6. The plaintiffs had also alleged a cause of action against the county of San Diego and its Marshal Michael Sgobba. The court granted a demurrer to these causes of actions, entering a judgment of dismissal in favor of the county and the Marshal. At the time of trial, plaintiffs' appeal as to this judgment was pending. However, on July 19, 1990, the court of appeal rendered its decision upholding the trial court's judgment of dismissal as to these parties. A Petition for Review by the Supreme Court has been filed by plaintiffs.

7. Total Condo is the debtor in a bankruptcy case pending in the United State Bankruptcy Court for the Southern District of California, Case Number 89-05172-LM11. This settlement with Total Condo Concepts, Inc. is contingent upon an order approving the compromise by the bankruptcy court. The trustee in bankruptcy through its attorney James Hill of Sullivan, Hill, Lewin & Markham, Harold S. Taxel has submitted an application for the bankruptcy court's approval. Notice of intent to settle

this lawsuit was served in the bankruptcy case. This motion is made subject to obtaining the bankruptcy court's approval which is anticipated to be granted on or before September 30, 1990.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct Executed this Fourth day of September, 1990, at San Diego, California.

LEWIS, D'AMATO, BRISBOIS & BISGAARD

By: /s/ Janice Gay Gibbons
JANICE GAY GIBBONS
Attorneys for Defendants and Cross-Complainants
STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR;
and STEVEN L. VICTOR, A.P.C.

PROOF OF SERVICE BY MAIL
(Code of Civ. Proc. Section 1013(a) and 2015.5)

I, JOANIE WILLIAMS, declare:

That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; I am employed in the County of San Diego, California, the county in which the subject mailing occurred. My business address is 1600 Pacific Highway, Room 355, San Diego, California 92101-2469. I served the within ANSWER TO PETITION FOR REVIEW OF DECISION by placing a copy thereof in a separate envelope addressed to each such addressee respectively as follows:

Murray M. Bankhead, Esq.
Solomon, Ward,
Seidenwurm & Smith
401 "B" Street
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Clerk of the
Superior Court
County of San Diego,
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Clerk of the Court
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William S. Boggs
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James Hill, Esq.
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San Diego, CA 92101

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each into the United States mail at San Diego, California on September ___, 1990.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California on September ___, 1990.

JOANIE WILLIAMS